IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 667 OF 1987.

The Commissioner of income-tax,
Bombay City-III, Bombay ... Applicant.

V/s.

Cadbury (India) Pvt.lLtd. ... Respondent.

Shri A.N. Kotangale with D.A. Dubey i/b K.C. Sidhwa for the applicant.

Shri J.D. Mistry i.b Crawford Bayley & Company for the respondent.

CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.

DATED : 9.8..2005

P.C. :

. By this reference made at the instance of the Revenue under section 256 (1) of the Income-tax Act, 1961, the Income Tax Appellate Tribunal has referred the following questions of law for the opinion of this Court:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the weighted deduction on account of agricultural development allowance under section 35C of the Income-tax Act, 1961, was admissible in respect of the depreciation of asset used for the purpose of providing goods services or facilities, laid down in section 35C(1)(b) in view of the provisions of section 35(2) of the Income-tax Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the provisions of sec. 1(iii) read with

sec.80V of the Income-tax Act override the provisions of section 40A(8) of the Income-tax, in computing the income of the assessee?

3. Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the interest under sec.216 is not levaible in view of the contents in Form Nos. 28 and 29?

2. Learned Counsel for both the parties agreed that so far as first 2 questions are concerned, they are covered by the different judgments of this Court. So far as first question is concerned, according to them, the same is covered by the judgment of this Court in the case of **CIT vs. Cadbury India Ltd. (2001) 249 ITR 475 (Bom.)** In this view of the matter, the question will have to be answered in the affirmative i.e. in favour of the assessee and against the Reveue.

3. So far as second question is concerned, the same is covered by two judgments of this Court in one of such cases in the case of **Hindustan Cocoa Products Ltd. vs. CIT (1999) 236 IR 140**. In this view of the matter, the second question will have to be answered in the negative i.e. in favour of the sassed and against Revenue.

4. So far as third question is concerned, it

relates to levaibility of interest on the dues under section 216 of the Income-tax Act for the assessment year 1976-77. Interest under section 216 is leviable if an assessee has underestimated the advance tax payable by him in 3 instalments and thereby reduced the liability to pay advance tax. Factual matrix reveal that the assessee's accounting year was to expire on 3.1.1976. The first instalment was to be paid on 15.9.1975. At that stage, assessee filed estimate of income in the sum of Rs. 50 lacs. It paid Rs.9,62,500/- being 1/3rd of the tax liability, which was in the sum of Rs. 28,70,500/- on the basis of estimated income of Rs. 50 lacs. So far as second instalment is concerned, the assessee revised its estimated income from Rs. 50 lacs to Rs.80 lacs, on the basis of which tax liability was in the sum of Rs.46,25,775/-. Subtracting the amount paid on 15.9.1975 which was in the sum of Rs.9,62,500/-, balance amount of advance tax payable was Rs. 36,63,275/-. The assessee paid advance tax in the sum of Rs. 18,31,638/- i.e. 50% of, Rs. 36,63,275/-.

5. On 15.3.1976, the assessee again filed another revision of estimate of income estimating it in the sum of Rs. 98,20,180/- on which the tax liability was in the sum of Rs. 56,71,154/-, out of which Rs. 28,77,016/- was already paid by the

assessee by way of advance tax (i.e. Rs.9,62,500/- + Rs.18,31,630/- = Rs.27,94,138/-) thus the balance amount of Rs.28,77,016/- was payable on or before 15.3.1976. This amount was paid by the assessee on 15.3.1976. Section 212, which has since been omitted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1988 provided for estimation of income by assessee. Sub-section (2) of section 212 enables an assessee to send a revised estimate of advance tax payable by him on or before any of the dates specified in section 211 and adjust any excess or deficiency in respect of any instalment allegedly paid in subsequent instalment or instalments. Though section 212 contemplates the filing of an estimate of current income and estimate of advance tax payable on such income yet the liability to pay interest arises for underestimation of advance tax and reducing the amount payable in either of the first two instalments. Underestimation of advance tax may be due to underestimation of income or may be due to wrong calculation or any other cause, but for purposes of section 216, it is not the cause that results in underestimation of advance tax that is relevant but it is the fact of underestimation of advance tax that is relevant and that alone creates liability for payment of interest. On the factual matrix of this case, sketched by us, we do not find any case having been made out by the applicant for

levying interest under section 216 of the Act. As a matter of fact, there has, neither been underestimation of advance tax nor any default in payment of advance tax. The assessee has made payment of advance tax as required under section 212 as such assessee is not liable to be saddled with the liability of interest under section 216.

6. Even otherwise, in absence of any finding recorded by the I.T.O. as required under section 216, no interest could have been levied under section 216 by the I.T.O. The finding contemplated by section 216 was condition precedent to the charging of the interest under sub-section (1) of section 216 but the condition was not complied with in that case.

7. It is no doubt true that on the facts of this case one more fact needs consideration that the form prescribed under Rules framed under the Act, viz., Form nos. 28 and 29 are not in conformity with the provision of section 212 (3). If one reads sub-section (3) of section 212 it is clear that provision of the Act and the form prescribed under the rules do not go hand in hand. This anomaly was sufficient to mislead anybody. As a matter of fact, this anomaly has created some confusion in the mind of the authorities below, though not in the mind of

the assessee. The Tribunal has anyhow exonerated the assessee from the liability to make payment of interest under section 216, we find no fault with the view taken by the Tribunal. As a matter of fact, assessee has correctly paid amount of advance tax as required. In this view of the matter, the question is answered in the affirmative i.e. in favour of the assessee and against the Revenue.

. Reference stands disposed of with no order as to costs.

(A.S.AGUIAR, J.) **(V.C.DAGA, J.)**